

JUN 21 1976

IN THE
Supreme Court of the United States

October Term, 1975

No. 75-1720

NEIL T. NAFTALIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**SUPPLEMENT TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

JOE A. WALTERS

FRANK J. WALZ

JOHN J. SOMMERVILLE

Thirty-Eighth Floor, IDS Tower

80 South Eighth Street

Minneapolis, Minnesota 55402

612 341-3800

Attorneys for Petitioner

Of Counsel:

O'CONNOR & HANNAN

Thirty-Eighth Floor, IDS Tower

80 South Eighth Street

Minneapolis, Minnesota 55402

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TO: THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

This supplemental filing is made pursuant to Rule 24, Rules of the Supreme Court, to call to the Court's attention intervening events not available at the last filing. Additional materials are included in the supplemental appendix annexed hereto.

Petitioner filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on May 26, 1976. That Petition sought review of the opinion and judgment of the United States Court of Appeals for the Eighth Circuit filed on March 30, 1976, as amended by a correcting order of April 12, 1976.

In an order dated May 27, 1976, the Court of Appeals, *sua sponte*, modified its opinion filed on March 30, 1976. (Supplemental Appendix, *infra*, p. SA-1). On June 1, 1976, the Clerk for the Court of Appeals issued a letter correcting the modifying Order. (Supplemental Appendix, *infra*, p. SA-2)

Because the May 27, 1976, modifying Order of the court of Appeals, as corrected, made significant substantive changes in its March 30, 1976, opinion and judgment, Naftalin filed a Petition for Rehearing in Banc with the Court of Appeals. The Petition for Rehearing In Banc is dated June 9, 1976, and was filed on June 10, 1976. It is reprinted in the Supplemental Appendix annexed hereto at p. SA-4.

Petitioner respectfully requests that this Court defer consideration of the Petition for a Writ of Certiorari, as supplemented, until such time as the Court of Appeals has ruled on the Petition for Rehearing In Banc. Petitioner will inform the Court when a ruling is made by the Court of Appeals.

Respectfully submitted,

JOE A. WALTERS
FRANK J. WALZ
JOHN J. SOMMERVILLE
Thirty-Eighth Floor, IDS Tower
80 South Eighth Street
Minneapolis, Minnesota 55402
612-341-3800
Attorneys for Petitioner

OF COUNSEL:

O'CONNOR & HANNAN
Thirty-Eighth Floor, IDS Tower
80 South Eighth Street
Minneapolis, Minnesota 55402
612-341-3800

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SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1975

No. 75-1692

THE UNITED STATES,

Appellant,

vs.

NEIL T. NAFTALIN,

Appellee.

Appeal from the United States District Court
for the District of Minnesota

On the Court's own motion, it is now here ordered that the language of the Court's opinion filed in this case on March 30, 1976, is modified as follows:

1. The last full paragraph on page 5, beginning with "Barket" and ending with "presumed" is to be omitted in its entirety.
2. On page 7, delete the first sentence of the last paragraph starting with the words "However, as we" and ending with "attack on pre-accusatory delay," and substitute the following: "However, only prejudice to an accused's ability to defend against the delayed indictment is relevant here."

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3. On page 9, delete the second sentence of the last paragraph which begins with "The absence of" and ends with "indictment" and substitute the following: "Further, as we have noted, much of the delay was reasonable and none was intended to weaken Naftalin's defense."

May 27, 1976

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

St. Louis, Mo. 63101

June 1, 1976

Robert C. Tucker, Clerk

Hon. Robert G. Renner & Mr. Thorwald H. Anderson Office of U. S. Attorney 596 U. S. Cthse. Minneapolis, Minnesota 55401	Mr. Joe A. Walters O'Connor & Hannan 38th Floor, IDS Tower Minneapolis, Minnesota 55402
Mr. Frank J. Walz O'Connor & Hannan 80 S. Eighth St. Minneapolis, Minnesota 55402	Mr. Neil T. Naftalin 19 South First Street, Apt. B1207 Minneapolis, Minnesota

Re: No. 75-1692. The U. S. v. Naftalin.

Dear Sirs:

Reference is made to the order entered in this case on May 27, 1976, modifying the Court's opinion of March 30 and more particularly to paragraph 3 of the modifying order. It appears that in attempting to make the modifica-

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tion another inadvertent error has been made. The Court intended to delete the second sentence of the last paragraph on page 9 beginning with "The absence of" and ending with "claim." The last sentence beginning "Therefore, the district court's" and ending "to reinstate the indictment." remains in the opinion.

I am sorry to have inconvenienced counsel in this matter and hope that you will make the indicated corrections in the order of May 27.

Very truly yours,

/s/ ROBERT C. TUCKER

Clerk

eh

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1692
Criminal

UNITED STATES OF AMERICA,
Appellant,
vs.
NEIL T. NAFTALIN,
Appellee.

PETITION FOR REHEARING IN BANC

The appellee, Neil T. Naftalin ("Naftalin"), petitions the Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for a rehearing of this appeal. Because the recent decisions of different panels of the Court appear to be inconsistent in their articulation and application of the principles of due process governing questions of pre-accusatory delay, we also respectfully suggest, pursuant to Rule 35, that the rehearing be held in banc.

Introduction

The Petition is prompted by the Court's sua sponte order of May 27, 1976, substantially modifying the language of the opinion previously filed on March 30, 1976 by a

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panel of the Court consisting of Judges Lay, Bright and Henley.¹

The March 30 opinion reversed a decision of the district court (Judge Earl R. Larson) dismissing an indictment against Naftalin by reason of a 52 month pre-indictment delay following what this Court described as Naftalin's "confession" to the Government. The May 27 order withdraws a significant portion of the stated rationale of the March 30 opinion, and substitutes different, narrower substantive language, without disturbing the result reached.²

Frankly, we are surprised and concerned that changes of this nature would be made at such a late date, on the Court's own motion. We further admit of some confusion as to the intended meaning of the changes, and even more confusion as to the current status of the law.

Our tentative conclusion is that the May 27 order was designed to achieve some sort of consistency, within the Court, between the stated reasoning of the decision in this case and that of the Court's prior decisions in United States v. Jackson, 504 F.2d 337 (8th Cir. 1974) [Judges Heaney, Stephenson & Smith], cert. denied, 420 U.S. 964 (1975); United States v. Barket, — F.2d—(8th Cir. No. 75-1320, Jan. 28, 1976) [Judges Gibson, Henley & Van Pelt]; and United States v. Lovasco, —F.2d—(8th Cir.

¹The May 27 order was itself corrected by a letter of the Clerk dated June 1, 1976. Previously, on April 12, 1976, the Court had entered a correcting order, at our request, modifying the first full paragraph of page 4 of the slip opinion, in one particular, to conform to the facts of record.

²By coincidence, the May 27 order was entered one day following Naftalin's filing of the Petition in the United States Supreme Court for a Writ of Certiorari to this Court, seeking review of the March 30 opinion.

No. 75-1852, Feb. 23, 1976) [Judges Clark, Bright & Henley].

If that was the objective, however, we submit that judicial consistency should not be sought post facto, without opportunity for input from the defendant whose cause is being subjected to the judicial fine tuning. We further submit that the desired consistency has not in fact been achieved, confusion within the practicing bar being a more likely result. Finally, and most importantly, we suggest that the Court's modifying order does new violence to Judge Larson's decision, as the fact-finder, without observance of the acknowledged standards of appellate review.

For those reasons, we request that this appeal be re-argued, before the full Court, with the full benefit of the Court's May 27 rational, as well as the Barket and Lovasco decisions.³

Jackson, Barket and Lovasco

As succinctly as we can state it, our understanding of the evolutionary process in the law of pre-accusatory delay in this Court is as follows:

Pre-Jackson, an indictment would in theory have been dismissed upon a showing of "unreasonable pre-accusation delay, coupled with prejudice", the governing standard of "prejudice" being a demonstrated impairment in an accused's ability to defend himself at trial. Unless prejudice were first demonstrated, however no inquiry into reasonableness would be made.

In Jackson, this Court took the Supreme Court in United

³Neither Barket nor Lovasco had been decided when this appeal was argued and submitted on December 9, 1975. Barket was submitted on December 12, 1975 and decided on January 28, 1976. Lovasco was submitted January 16, 1976, decided February 23, 1976.

States v. Marion, 404 U.S. 307 (1971), as its word, opting for a "balancing" test of the reasons for the delay against the prejudice to the accused. The Court thereby permitted itself the logical hypothesis of "outrageous" cases of unjustified delay in which the scale might be tipped so far as to dispense with the necessity of demonstrating any prejudice.⁴

In Barket, decided while Naftalin was under submission, the Court affirmed the dismissal of an indictment for a 47 month pre-accusatory delay, based upon a finding of governmental negligence plus a modest showing of actual prejudice. Despite what it did, the Court said it was expressly declining to determine whether a statement concerning prejudice and intentional delay in Marion was intended to be conjunctive or disjunctive, that is, whether actual prejudice must be coupled with intentional governmental misconduct, or whether the presence of either factor is sufficient to require dismissal.⁵

In Lovasco, decided one month later, also while Naftalin was under submission, the Court affirmed the dismissal of an indictment for a 17 month pre-accusatory delay, again on the basis of an unreasonable, but unintentional, delay, coupled with ostensible prejudice. It said

⁴Although neither Judge Larson nor we read it that way, the Court in Naftalin now says the only "outrageous" case it had in mind in its hypothesis was a case of intentional delay by the Government for tactical advantage.

⁵Judge Henley dissented, stating his view that only actual prejudice joined with serious governmental misconduct would suffice, and questioning the sufficiency of the showing of prejudice which had been made. [In that regard, compare the proffered testimony of the deceased witnesses whose presence was considered indispensable to the issue of the bona fides of Mr. Barket's documented loan transactions, with that of the deceased witness whose testimony was alleged by Naftalin to be material to the question of whether he intended to cover his short sales. The latter claim of prejudice was rejected by both Judge Larson, and by this Court, with the observation that "assuming the relevance of the alleged witness' testimony, his dealings with Naftalin could be established from his and Naftalin's records. . . ."]

nothing about conjunctive or disjunctive, but apparently employed a disjunctive standard.⁶

Then came Naftalin, which discussed Barket at length, and mentioned Lovasco, but found no solace in either of them for Naftalin, for whom it applied standards here discussed.⁷

Naftalin—The May 27 Order

The Court's May 27 order, as corrected on June 1, deletes the following language from its March 30 opinion:

- (1) Barket emphasizes that prejudice to the accused's ability to defend against the charges made in indictment is a sine qua non of a valid claim of pre-accusatory delay. If such prejudice is found, it must be balanced against the reasonableness of delay. But absent such prejudice, the reasonableness of the delay becomes irrelevant. Of course, as we discuss below, the necessary prejudice may sometimes be presumed. (p. 5, slip opinion)
- (2) However, as we have previously observed, only prejudice to an accused's ability to defend against the indictment will support a due process attack on pre-accusatory delay. (p. 7, slip opinion)

⁶Again, Judge Henley dissented, observing that the dismissal had been predicated on the flimsiest showing of claimed prejudice, and reaffirming his views on the conjunctive test. [Compare the severity of the circumstances in *Naftalin* and *Lovasco*, and compare Lovasco's claim concerning a deceased witness with Naftalin's claim.]

⁷In view of the result reached, Judge Henley concurred specially in *Naftalin*.

- (3) The absence of such prejudice is fatal to Naftalin's due process claim. (p. 9, slip opinion)

In its place, the order substitutes the following:

- (1) However, only prejudice to an accused's ability to defend against the delayed indictment is relevant here. (p. 7, slip opinion) [Emphasis added.]
- (2) Further, as we have noted, much of the delay was reasonable and none was intended to weaken Naftalin's defense. (p. 9, slip opinion)

However desirable they may be in terms of attempting to square Naftalin with Jackson, Barket and Lovasco, the changes made are clearly more than "cosmetic". They alter the Court's stated rationale.

In its original text, despite its explanation of the "outrageous" hypothetical in Jackson, and its discussion of Barket and Lovasco, the Court thrice indicated, as noted above, that actual prejudice to an accused's defense at trial is vitally necessary to sustain a claim of pre-indictment delay, the reasonableness of the delay being wholly irrelevant until such prejudice is shown. Since Judge Larson had not found specific prejudice to Naftalin's defense, and since the Court had no difficulty in embracing that negative finding, the remainder of the Court's discussion was academic.

Now, two months later, the substituted rationale appears to be that the reasonableness of delay is (once again) relevant, and that neither actual prejudice nor intentional

delay by the Government may always be required, in every case, either alone or in conjunction with each other. The result, however, remained the same, for, as the Court explains, actual prejudice was required in this case, because "much" of the 52 month delay following Naftalin's admissions to the Government was "reasonable", and because Naftalin was not the victim of intentional delay for tactical advantage.

We did not request a rehearing of the March 30 decision, for a number of reasons, prominently including the apparent insurmountability of the "actual prejudice" hurdle, as the Court had then defined it.⁸ Instead, we filed a Petition for a Writ of Certiorari, seeking to bring the most fundamental issues resolved in the Court's March 30 opinion to the Supreme Court's attention.⁹

The May 27 order, however, represents an "about face" by the Court on a critical point of departure in this case. If "balancing" and "delicate judgments" are indeed to be honored exercises on pre-indictment delay questions; if "reasonableness" is to be seriously assessed in all cases; and if "actual prejudice" and "intentional delay" are to be respected as guidelines, but not straitjackets, then it

⁸It is also a fair statement that from our review of *Barket*, *Lovasco* and *Naftalin*, it appeared that the common member of those panels, Judge Henley (whose views are consistent), was making distinct progress within the Court, in a direction which did not bode well for any attempt to seek reargument.

⁹Our Petition for a Writ of Certiorari raises two principal questions. The first is whether, as a matter of substantive due process, the Government, with full possession of underlying facts brought to its attention by the accused, may delay an indictment for 52 months, for any reason, with or without a showing of "actual prejudice" to an accused's defense. The second issue challenges the SEC's "customary" enforcement policy of proceeding consecutively from civil injunctive actions through administrative proceedings before referring its investigative files for criminal prosecution, a procedure to which this Court has given *carte blanche* approval.

seems to us the Court should take a fresh look at this appeal, thereby observing at the outset, rather than as afterthought, the ground rules upon which it has now apparently settled.

The Standards of Appellate Review

Finally, the provision of the Court's May 27 order adding the sentence "further, as we have noted, much of the delay was reasonable and none was intended to weaken Naftalin's defense" is particularly troublesome. Although the original opinion contained brief mention of "reasonableness", it did so in the context of the Court's prior statement that the reasonableness of the delay in this case was irrelevant. Nor did the opinion contain any real analysis of the underlying circumstances, or purport to make any finding of "reasonableness" concerning them.

Judge Larson, however, did find as a factual matter that the delay was "clearly without justification". From that he concluded the delay was "outrageous", under what he construed to be an independent ground for dismissal in *Jackson*, and dismissed the indictment. As a result, he did not reach the question of whether the delay was intentional or negligent.¹⁰

Therefore, in substituting the language "much of the delay was reasonable", this Court has overruled Judge Larson's finding that the delay was totally unjustified, in disregard of the appellate principle that a lower court's findings will be sustained unless clearly erroneous. In addition, in confirming its March 30 finding that the delay was unintentional (a previously non-essential find-

¹⁰Judge Larson merely commented that even if the delay had been "innocent or inadvertent", it was completely unjustified, and the due process clause required dismissal.

ing which has become critical under the Court's May 27 rationale), the Court has determined a fact question not decided by the district court, without first affording it an opportunity to resolve the issue, and has made a finding which, we submit, is clearly contrary to the record.¹¹

Conclusion

In light of the Court's modifying order of May 27; the seemingly vacillating rationale of its recent decisions; and in the interest of the uniform administration of justice, we request a rehearing of this appeal, and respectfully suggest that it be held in banc.

Respectfully submitted,

OCONNOR & HANNAN
By /s/ JOE A. WALTERS
FRANK J. WALZ

Thirty-Eighth Floor, IDS Tower
80 South Eighth Street
Minneapolis, Minnesota 55402
612 341-3800
Attorneys for Neil T. Naftalin

DATED: June 9th, 1976.

¹¹As more fully outlined in our brief on appeal, the record discloses, *inter alia*, that the SEC monitored the Naftalin bankruptcy proceedings, and several civil fraud actions commenced against Naftalin by broker-dealers, for nearly three years, while doing virtually nothing in its injunctive action; it likewise strung out its administrative proceeding for nearly another two years in order to force the issue of Naftalin's testimony. As disclosed in its own files, the bulk of the monitoring and jockeying occurred long after the SEC had determined that criminal prosecution would ultimately be recommended. If such tactics do not bespeak the kind of calculated, intentional delay contemplated in *Marion*, we submit that no such delay could ever be recognized by this Court.